No. 81107-5

SUPREME COURT OF THE STATE OF WASHINGTON

TERESA and MICHAEL AMBACH, wife and husband, individually, and the marital community composed thereof,

Plaintiff/Respondents,

vs.

H. GRAEME FRENCH, M.D. and JANE DOE FRENCH, individually and the marital community composed thereof; THREE FORKS ORTHOPAEDICS, P.C. et al.,

Defendants/Petitioners.

PETITIONERS H. GRAEME FRENCH, M.D., AND THREE FORKS ORTHOPAEDICS, P.C.'s MOTION TO MODIFY ORDER STRIKING PORTIONS OF PETITIONERS' SUPPEMENTAL BRIEF

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1. Identity of Petitioners / Movants

Petitioners / Movants are H. Graeme French, M.D., and Three Forks Orthopaedics, P.C. (collectively referred to herein as "Dr. French"). Petitioners move for the relief designated in Part 2.

2. Statement of Relief Sought

Petitioners move, pursuant to RAP 17.7, for this Court to Modify the March 11, 2009 Order, by the Assignment Justice, which granted Respondents' Motion to Strike portions of Petitioners' Supplemental Brief and which, *sua sponte*, struck Petitioners' Statement of Additional Authority.

3. Facts Relevant to Motion

A. Introduction

This case commenced as a medical malpractice claim that was conjoined with an assertion that the Plaintiff's alleged damages also constituted compensable injuries under the Consumer Protection Act, RCW 19.86 *et seq.* ("CPA"). At the end of March 2006, pursuant to CR 54(b), the trial court entered final judgments on Defendants Dr. French and Whitman Hospital's CR 11 sanctions motions relating to Plaintiffs' assertion of CPA claims against them.[1] On or about November 27, 2007,

[1] While these issues were on appeal, the Plaintiff's remaining claims against Dr. French (medical negligence, etc.) went to a jury trial in March of 2007. The jury found in favor of Dr. French on all claims.

the Division III Court of Appeals issued a published decision which reversed the trial court's grant of summary judgment to Dr. French on the Plaintiff's CPA claim and also reversed the CR 11 sanctions order which had been granted in favor of Dr. French. *See Ambach v. French*, 141 Wn. App. 782 (2007).

Division III held that the damages alleged by Plaintiff Teresa Ambach ("Ambach"), which included medical expenses, wage loss, loss of earning capacity, and out-of-pocket expenses, constituted injuries to her "business or property" for purposes of the CPA. The Ambach Court surely appears to have recognized, however, that the "entrepreneurial activities" (*i.e.*, "trade and commerce") element must be analyzed in order to render a proper decision on the injury to business or property issue. Accordingly, it ruled (erroneously) that if a physician performs an allegedly unnecessary surgery "for financial gain," that such "alleged conduct" "fell within the entrepreneurial aspects of health care" that satisfies the trade and commerce touchpoint of CPA jurisdiction. *Id.* at p.788.

On December 26, 2007, Dr. French's trial counsel filed a Petition for Review. After noting the Court of Appeals' improper reliance upon cases involving the "entrepreneurial aspects" element of Ambach's CPA claim for injury and damages, Dr. French also urged that the *Ambach*

decision would essentially "deem all medical malpractice claims to also be recoverable under the Consumer Protection Act . . . in direct conflict with the legislative policies enumerated under RCW 7.70." *Dr. French's Petition for Review*, p.4. In that same Petition for Review, Dr. French argued as follows:

> .... Thus, in order to establish a cause of action under the CPA against a medical practitioner, a plaintiff must provide evidence of dishonest and unfair practices that are used to promote the medical practice or to increase profits and the volume of patients, *i.e.*, the claim must exclusively implicate the entrepreneurial practice of medicine and not arise out of health care. *See* [*Wright v. Jeckle*, 104 Wn. App. 478, 484-85 (2001)]; *Quimby v. Fine*, 45 Wn. App. 175, 180, 724 P.2d 403 (1986). The alleged conduct must be unrelated to the actual competence of the medical practitioner. *Quimby*, 45 Wn. App. at 180. The entrepreneurial aspects of the practice of medicine include how the price of medical services is determined, billed, and collected; the way a medical practice obtains, retains, and dismisses patients; and the promotion of operations or services to increase profits and the volume of patients. *See id.*

Dr. French's Petition for Review, p. 2 (emphasis added).

Further, in arguing why "Review of the Court of Appeals' Decision Should Be Granted," Dr. French urged as follows:

> In addition, the [*Ambach*] decision holds tremendous significance and public policy implications to all medical malpractice litigants, as it would essentially deem all medical malpractice claims to be also recoverable under the Consumer Protection Act. This is in direct conflict with the legislative policies enumerated under RCW 7.70, which were intended to provide the sole bases for recovery for

> medical malpractice claims. Accordingly, review is warranted by the Supreme Court under both RAP 13.4(b)(2) and (4).

Id. at 4 (Emphasis added).

Upon the bases of these predicates, Dr. French then noted as his issues for review. They can be summarized as follows:

i. In the context of a medical malpractice action do personal injury damages such as medical expenses satisfy the CPA's injury to business or property requirement?

ii. Are medical expenses sufficient to satisfy the CPA jurisdictional requirement?

iii. Discretionary review should be granted because the matters portended by the *Ambach* decision constitute matters of substantial public interest that should be decided by the Supreme Court.

B. Ms. Ambach's Answer to Dr. French's Petition for Review Went Well Beyond the Limited Issue of Whether Personal Injury (Medical Malpractice Injuries) Are Also Compensable Under the Consumer Protection Act

In her response to Dr. French's Petition for Review, Ms. Ambach specifically noted that before a Court can determine whether a medical negligence "injury" can also constitute injury under the CPA, that the Court must first consider this threshold issue of whether the injury

occurred while the doctor was engaged in "entrepreneurial activities" (and thereby meet the "trade and commerce" requirement of the CPA). Specifically, she stated as follows:

> "Pecuniary damages" as the term was used by the Court of Appeals are necessarily limited to those pecuniary damages that flow directly from the deceptive transaction – the promotion of a surgery for entrepreneurial reasons.

Appellant's Answer to Petition, p.8 (emphasis added).

> A Consumer Protection Act claim may be brought against a physician if it involves the entrepreneurial aspects of his practice, such as promoting a surgery for profit rather than medical necessity.

Appellant's Answer to Petition, p.11 (emphasis added).

This Court accepted review in September of 2008.

On September 30, 2008, Dr. French moved this Court for an Extension of Time to File a Supplemental Brief and to Solicit/Obtain Amicus Assistance ("Motion for Extension"). Dr. French's Motion for Extension explicitly requested additional time to, among other things, further address the Court of Appeals' ruling that an allegedly unnecessary surgery performed for financial gain satisfies the "entrepreneurial aspects" of the practice of medicine. Specifically, Dr. French stated as follows:

> Further, a Supplemental Brief is required to address the Court of Appeals' ruling that if a physician performs

> allegedly unnecessary surgery "for financial gain" (which surely occurs in 98% of the procedures performed by surgeons), the "entrepreneurial aspects" predicate that extends Consumer Protection jurisdiction to professionals under RCW 19.86.090 is fully applicable. *See id.*, pp.787-788.

See Motion for Extension, pp.4-5.

Dr. French's Motion for Extension was granted on by the Clerk of the Supreme Court the same day it was filed (September 30, 2008), and the Supplemental Brief was filed on December 3, 2008. On December 3, 2008, Ambach also filed her Supplemental Brief.

Although Ambach had earlier argued (and agreed) that a doctor must be engaged in entrepreneurial activities before a CPA claim will lie against a physician (*see Appellant's Answer to Petition,* p.11), she moved this Court to strike all of Dr. French's Supplemental Brief insofar as it concerned that issue. But Ambach also expended half of her Motion to Strike addressing the merits of Dr. French's Supplemental Brief. *See* Ambach's Motion to Strike, pp. 8-17. Ambach can claim no prejudice.

This "entrepreneurial activities" predicate issue and the other unavoidable interplay, *i.e.*, whether a healthcare injury can only be litigated under the *aegis* of RCW 7.70 (per *Branom v. State*, 94 Wn.App. 964-969 (1990)) precipitated substantial amicus briefing by constituents who will surely be affected by this Court's ruling in the present case. The

present *amicus* parties supporting Dr. French are the Washington State Defense Trial Lawyer's Association and the Washington State Medical Association in cooperation with the American Medical Association and Physicians Insurance Company. As noted in those *amicus* briefs, the impact of the Court of Appeals' decision goes far beyond Dr. French and every for-profit physician now sued for malpractice is also subject to the CPA.

In support of Ambach, a brief was filed by the Washington State Foundation for Justice (formerly Washington State Trial Lawyers Association ("WSTLA")).

Each of these *amicus* briefs has not only touched upon the issue before the Court, but each of them also addressed this Court's February 5th decision in *Michael v. Mosquera-Lacy*, ___ W.2d ___, 200 P.2d 695 (2009). In that seminal ruling, this Court held that a claim that relates to a physician's judgment and treatment of a patient cannot be deemed "entrepreneurial conduct" that creates the "in trade and commerce" touchstone of the CPA.

The *dictum* in the *Ambach* case that an "unnecessary surgery" (which is certainly a claim which relates to a physician's judgment and treatment) is entrepreneurial conduct, as a matter of law, is obviously contrary to this Court's decision in *Mosquera-Lacy*. Accordingly, all of

the *amicus* parties have not only weighed in with their expected arguments on the scope of medical malpractice injuries that can constitute an injury compensable under the CPA, *i.e.*, an injury to "business or property," but also the preclusive effects of the *Mosquera-Lacy* decision and RCW 7.70.

4. Argument

A. Given the Public Import of the Issue Before this Court, *i.e.*, When Can a Claim for Medical Malpractice Injuries Also Constitute an Injury to a Patient's "Business or Property," and Thus Also Subject a Doctor to a Consumer Protection Act Claim, the Order to Strike Should be Withdrawn and/or Modified.

i. This Motion to Modify or Reconsider is Properly Before the Court

An aggrieved person may object to an order of a Justice. *See* RAP 17.7; *see also Washington Fed. Of State Employees, Council 28, AFL-CIO, v. State of Washington*, 99 Wn.2d 878 (1983)(a motion to modify may be made of a ruling of a Justice). "A motion to the Justices in the Supreme Court will be decided by a panel of five Justices unless the court directs a hearing by the court en banc." *Id.*

It is respectfully urged that the Assignment Justice did not apply the proper standard when he or she issued the Order not only striking Dr. French's Supplementary briefing, but also, *sua sponte,* struck Dr. French's Statement of Additional Authority (regarding the relevant issues portended by this Court's *Mosquera-Lacy* decision).

On their face, RAP 13.7 and 13.4 do constitute limits on the scope of matters that may be reviewed. But those rules are not to be woodenly applied. That is the mandate of RAP 1.2(a). It provides:

> These rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits. Cases and issues will not be determined on the basis of compliance or noncompliance with these rules, except in compelling circumstances where justice demands . . .

RAP 1.2(a)(emphasis added)

Given Ms. Ambach's own admission that a physician must be engaged in entrepreneurial activities (before any injury he or she inflicts upon a patient may be deemed both medical malpractice and an injury to a patient's "business or property"), the analysis necessary to "facilitate the decision of [this] case on the merits" requires consideration of the issues raised in Dr. French's Supplementary Brief.

Moreover, it is respectfully suggested that the Order Striking Dr. French's Supplemental Brief should be modified, because it lacks any finding that "compelling circumstances" demanded a strict adherence to the rules contained in RAP 13.4 and 13.7. Yet, that is the standard that must be applied. As noted by this Court in *State v. Olson*, 126 Wn.2d 315, 318-319 (1995):

> The clear language of this rule . . . compels us to find that a technical violation of the rules . . . should normally be overlooked and the case should be decided on the merits.

> This result is particularly warranted where the violation is minor and results in no prejudice to the other party . . .

Certainly, Ms. Ambach will not be prejudiced by including in this appeal the interplay between the requirement that the subject injury must first be deemed to have occurred while the defendant physician was engaged in "entrepreneurial activities" (thereby establishing that the doctor was engaged in trade and commerce), and the issue of whether that same injury constituted an "injury to [the patient's] business or property."

Just as necessary to determine the issue before this Court on the merits is consideration of the Legislature's public policy requirements is this interplay of RCW 7.70 to the issue before the Court. It states that the exclusive remedy for injury resulting from healthcare lies in adherence to that statute. *Branom v. State*, 94, Wn. App. 964, 969 (1994). As such, when damages relate to health care, they are not recoverable under the CPA (*i.e.*, they are not injury to business or property). If the conduct is not health care, but rather is entrepreneurial conduct, then the damages (if they are an injury to business or property) may be recoverable under the CPA. *Wright v. Jeckle*, 104 Wn.2d 478 (2001). Thus, the preliminary inquiry that must be undertaken before the "injury to business or property" issue is resolved on the merits is whether the damages arise from health care and are excluded from recovery under the CPA by RCW 7.70 *et seq.*

That inquiry involves an evaluation of whether the conduct at issue is "health care" (thus under RCW 7.70) or "entrepreneurial conduct" (thus potentially recoverable under the CPA).

Ms. Ambach recognizes the interplay of these issues since her reply to *amici* is replete with references to "entrepreneurial conduct," even though this Court struck Dr. French's Supplemental Brief as it related to "entrepreneurial conduct." For example, but without limitation:

- "Assuredly, there is overlap in the limited damages Ms. Ambach seeks here under the Consumer Protection Act and the losses she sustained as a result of the malpractice." *Ambach's Reply to Amici*, p.9.
- "[T]he Court (in your decision in *Michael v. Mosquera*-Lacy, ___ Wn.2d ___, 200 P.3d ___ (2009)) held that performing a surgery without properly informing the patient of all the material risks could be a violation of the CPA, if motivated by financial considerations...." *Id.* (Emphasis added)(citing *Quimby v. Fine*, 45 Wn. App. 175 (1986)).
- "The implication of the highlighted sentence (from the Court's decision in *Mosquera*-Lacy) is that the result would have been different if the patient had been able to show that the physician

used cow bone for the purpose of increasing profits or patients." *Id.*, ppp.11-12.

- "... Dr. French engaged in a pattern of making fictitious diagnoses so that he could perform surgery for profit. This is not health care; this is being in business to perform surgeries." *Id.*, p.14.
- "... Ms. Ambach alleges that Dr. French is in business to sell a commodity (shoulder surgery), rather than providing health care." *Id.*,p.14.
- "... Ch. 7.70 RCW does not provide the exclusive remedy for wrongs committed by physicians in a health care setting." *Id.*, p.15 (citing WSTLA's *amicus* brief).
- "... WDTL fails to mention that the court went on to cite *Quimby* for the proposition that the consumer claims against physicians stand if such claims implicate the entrepreneurial aspects of the practice." *Id.*, p.17.[2]

Lastly, it is respectfully noted that the authority cited in the Order Striking Dr. French's Supplemental Brief, *State v. Korum*, 157 Wn.2d 614, 624-625 (2006) did not even address the gateway issue as is required by

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[2] Ms. Ambach's Reply Brief also contains a misleading footnote which references an investigation of Dr. French's surgeries by the Medical Quality Assurance Commission ("MQAC"), and a suspension of Dr. French's privileges by Pullman Memorial Hospital (over ten years ago). Ms. Ambach intentionally fails to point out that MQAC found no wrongdoing by Dr. French, and that Pullman's suspension was overturned by an arbitrator. *E.g.*, CP 237.

RAP 1.2(a), *.i.e.*, a judicial determination as to whether compelling circumstances and justice demanded that Petitioner's Supplemental Brief not be considered by this Court. Moreover, the *Korum* decision was rendered by four Justices. The one Justice who concurred did not speak to the issue of strict adherence to RAP 13.7 and 13.4.

Lastly, in addition to RAP 1.2(a)'s mandate to not woodenly apply RAP 13.7 and 13.4, and to hear the case on the merits is the rule, as noted in *State v. Olson*, 126 Wn.2d 315, 323 (1995):

> This discretion, moreover, should normally be exercised unless there are compelling reasons not to do so. In a case where the nature of the appeal is clear and the relevant issues are argued in the body of the brief and citations are supplied so that the Court is not greatly inconvenienced and the respondent is not prejudiced, there is no compelling reasons for the appellate court not to exercise its discretion to consider the merits of the case or issue.

Id.

This Court even has the discretion to address issues raised for the first time in a supplemental brief. *Shoreline Comm. College Dist. No. 7 v. Employment Security Dep't*, 120 Wn.2d 394 402 (1992). Although a court will normally decline to consider an issue raised for the first time in a supplemental brief, "the court has inherent authority to consider the issue if such consideration is necessary to reach a proper decision." *Id.*

Through Dr. French's Supplemental Brief, Ambach's Motion to Strike, and the *amicus* briefs, the "entrepreneurial aspects" issue has been fully briefed by the parties, and Respondents can claim no prejudice.

5. Conclusion

For the foregoing reasons, Dr. French respectfully requests that this Court grant his Motion to Modify.

Respectfully submitted this 17th day of March, 2009.

REED & GIESA, P.S.

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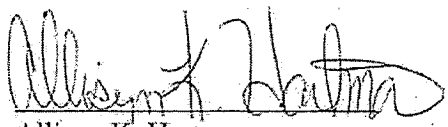
CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of March, 2009, I caused a true and correct copy of the foregoing document to be served upon the parties as indicated below.



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